

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD TERRY FRIEND,

Defendant-Appellant.

UNPUBLISHED

April 20, 2004

No. 246443

St. Clair Circuit Court

LC No. 02-002570-FC

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions on two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant was sentenced to prison terms of 12 to 35 years for his CSC I convictions and 10 to 15 years for his CSC II convictions. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court interfered with his ability to present a defense by not permitting him to present evidence that molesting children was not consistent with his character. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Hine*, *supra*.

Specifically, defendant contends that the trial court erred in not allowing him to question certain witnesses regarding their opinions as to defendant's good moral character as it related to children, and the court erred in ruling that defendant had opened the door regarding character evidence which allowed the prosecution to question the witnesses regarding their character opinions in light of a videotape made by defendant.¹ MRE 404(a)(1) provides that evidence of a

¹ The videotape showed defendant masturbating and speaking to the camera in a very sexually explicit manner. Defendant asserted that the videotape was made as a joke for a former
(continued...)

pertinent character trait offered by the accused or by the prosecution to rebut the same is admissible to show that the accused acted in conformity with his character.

Defendant was not permitted on cross-examination to ask one witness, “Is [defendant] a child molester?”; “Does he like to date women?”; and “Has he ever dated little kids?” The court disagreed with defendant that the charges against him equaled an accusation that defendant was a homosexual pedophile. The court did permit questions, however, that elicited from the witness that defendant had babysat his children in years past and that the witness would not have allowed this to occur if he had any doubts as to defendant’s integrity. Defendant’s claim that he was improperly restricted from asking this witness questions regarding his opinion of defendant’s character is without merit. Such questions are properly posed during a defendant’s case-in-chief, not on cross-examination. *People v Thomas*, 126 Mich App 611, 622; 337 NW2d 598 (1983). This is so because a prosecutor cannot introduce evidence to rebut the defendant’s character until the defendant has injected the issue into the trial.² *Id.* The trial court did not abuse its discretion in ruling that the above-quoted questions were impermissible.

We also find that the trial court did not abuse its discretion in permitting the prosecution to use the transcript of the videotape to rebut defendant’s contention that he was of good moral character. The defense elicited on direct examination from two of its witnesses that (1) defendant was of good sexual moral character; (2) he liked and dated women; and (3) he never dated children. On cross-examination, the prosecutor read excerpts from the videotape and asked the witnesses if, in light of the content of the videotape, did their opinion of defendant’s sexual morality change. Both stated that it did not.

Our Supreme Court has held that once a defendant has placed his character in issue, it is proper under MRE 404(a)(1) for the prosecution to introduce evidence that the defendant’s character is not as impeccable as is claimed. *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). On cross-examination, the prosecutor attempted to rebut defendant’s assertion of good character by questioning the witnesses as to whether knowledge that defendant had made a sexually explicit videotape or the contents of the videotape would change their opinion of defendant’s character. This was proper rebuttal.

Defendant claims that this was not proper rebuttal because he only wanted to present evidence of defendant’s character as it related to children and the prosecution was introducing evidence of moral character as it related to adult women. Defendant was not permitted to ask any questions regarding defendant’s sexual morality towards children specifically, but was limited to testimony regarding his sexual morality in general. While we find that it may have been error for the trial court to so restrict the testimony, we find that any error was harmless because despite the court’s rulings the defense character witnesses did in fact testify that defendant had not acted inappropriately towards children and did not express any sexual interest

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girlfriend. The trial court excluded the videotape itself, but allowed the prosecution to read excerpts from its transcript.

² It is important to note that the prosecution did not pose any questions to this witness regarding the videotape defendant had made.

in them. In regards to the prosecution's rebuttal evidence, the jury was aware that it was allegedly made for a former adult girlfriend and the prosecution was limited to asking the witnesses if their opinion changed in light of the contents of the tape. Therefore, we do not find that it was an abuse of discretion for the trial court to permit this rebuttal evidence.

Defendant next argues that the prosecutor committed misconduct when she stated that the fact that defendant taped himself in a sexually explicit manner corroborated the victim's testimony that defendant made a sexually explicit videotape of the victim. Defendant also asserts that defense counsel's failure to object constituted ineffective assistance of counsel. Unpreserved issues such as defendant's prosecutorial misconduct claim are reviewed for plain error which affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court decides issues of prosecutorial misconduct on a case-by-case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *Id.*

Defendant alleges that the prosecutor's remarks were an impermissible comment on propensity evidence. Plaintiff counters that the prosecutor's comments were nothing more than a fair comment on the evidence. We find that although the prosecutor's remark linking the fact that defendant made a sexually explicit videotape of himself made it more likely that he made one of the victim was arguably improper, it constituted harmless error. The contents of the videotape were introduced for the limited purpose of assessing the victim's credibility in regards to the similarity of sexual terminology the victim used when compared to those used on the videotape defendant made of himself. The prosecution never attempted to forge any link between the videotape and one allegedly made of the victim, save for the one isolated remark during closing argument, and defendant was not charged with an offense relating to the making of the alleged videotape of the victim. The jury was instructed that arguments by counsel are not evidence and also received a limiting instruction as to the proper use of the videotape. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Given these circumstances, any error was harmless and reversal is not required. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Accordingly, we find that defense counsel was not ineffective for failing to object to the prosecutor's remark. *Snider, supra* at 424-425.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski